



INTERIOR BOARD OF INDIAN APPEALS

Norman R. Byrd v. Commissioner of Indian Affairs

7 IBIA 142 (05/11/1979)

Judicial review of this case:

Reversed, *Byrd v. Andrus*, No. C-79-229 (E.D. Wash. Oct. 16, 1981)

Dismissed, No. 81-3631 (9th Cir. June 17, 1982)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF NORMAN R. BYRD
v.
COMMISSIONER, BUREAU OF INDIAN AFFAIRS

IBIA 77-44-A

Decided May 11, 1979

Appeal from a decision of the Commissioner, Bureau of Indian Affairs, affirming a rental adjustment order of the Superintendent, Yakima Agency, Washington.

Affirmed.

1. Indian Lands: Leases and Permits: Long-Term Business/
Agriculture: Rentals

The 20 percent limitation regarding rental adjustments appearing only in the ARBITRATION clause of the subject lease has no application to rental adjustments which may be effected pursuant to the RENTAL ADJUSTMENT clause of the lease and regulations.

APPEARANCES: Richard L. Wiehl, Esq., Halbertson, Applegate & McDonald, for the appellant Norman Byrd; James R. Kuhn, Jr., Esq., Office of the Regional Solicitor, U.S. Department of the Interior, for the appellee Bureau of Indian Affairs.

OPINION BY CHIEF ADMINISTRATIVE JUDGE WILSON

Pursuant to an order of the Board of Indian Appeals dated June 4, 1977, the above-entitled matter came on for hearing before Administrative Law Judge E. Kendall Clarke at Yakima, Washington, on December 2, 1977.

Thereafter, on January 19, 1979, Judge Clarke issued a decision wherein he recommended that the commissioner's decision of May 18,

1977, affirming the area director's decision of March 7, 1977, be set aside and the annual rental for the 5-year period commencing November 1975 be set at \$2,646.

The Board has reviewed the record and the briefs submitted by counsel, and we disagree with Judge Clarke's recommendation that the rental commencing November 1975 be set at \$2,646 per annum.

The controversy, as we see it, centers around (1) the interpretation of paragraphs one and two of Exhibit "B" of lease No. 3644 ^{1/} involving Yakima allotment No. 1719, Pallog Wynaco, and (2) the validity of the superintendent's adjustment of the rental by 150 percent beginning December 1, 1975. The lease in question was granted to Norman R. Byrd, hereinafter referred to as appellant, for a period of 25 years commencing March 1, 1966, at a yearly rental of \$2,100.

The thrust of appellant's argument is that the 20 percent limitation appearing only in the arbitration clause is also applicable to the rental adjustment clause. Accordingly, the appellant contends that the adjustment by the superintendent of the annual rental from \$2,100 to \$5,500 effective as of December 1, 1975, was improper in that the adjustment was in excess of the 20 percent limitation. In support of the foregoing interpretation, the appellant maintains it was the understanding of the negotiators of the lease, Ruby K. Ellis, for the Bureau of Indian Affairs, and Dean Smith, for appellant, that

^{1/} These paragraphs provide:

"1. RENTAL ADJUSTMENT CLAUSE

"It is understood and agreed that the rental specified herein shall be subject to adjustment by the Superintendent of the Yakima Indian Agency at not less than five-year intervals.

"Such review shall give consideration to the economic conditions at the time, exclusive of improvements or developments required by the contract or the contribution value of such improvements. Any adjustments or rental resulting from such review may be made by the Secretary where he has the authority to grant leases otherwise the adjustment must be made with the concurrence of the owners and the approval of the Secretary.

"2. ARBITRATION

"If there is a disagreement concerning the rental adjustment figure, the questions will be submitted to a board of three appraisers, one selected by the Superintendent, Yakima Agency, one selected by the lessee, and the third selected by the other two. In no event shall the increase or decrease exceed 20 per cent. It is further understood and agreed that the Secretary shall be expected to accept decisions reached by such an arbitration board, but he shall not be bound by any decision which might be in conflict with the interests of the Indians or the United States Government."

any increase in rental under the adjustment clause would be limited to 20 percent.

The Bureau of Indian Affairs on the other hand contends that the 20 percent limitation is applicable only to the arbitration clause and in no way limits any adjustments made of the rental under the rental adjustment clause.

There appears to be no dispute that the superintendent of the Yakima Agency was within his authority to adjust the rental in accordance with the rental adjustment clause of the lease and Departmental regulations. See 25 CFR 131.8 (1965). 2/

It is around clause two that the controversy actually focuses. The question to be resolved is whether the superintendent was bound by the 20 percent limitation in making the rental adjustment.

[1] A review of the two paragraphs in issue shows them to be clear and unambiguous. Paragraph one mandates the superintendent to adjust the rentals in accordance with economic conditions at intervals of not less than 5 years. Clearly, the paragraph is in compliance with the regulations which require the superintendent, with few exceptions, to obtain the highest economic return to the Indian owner. See 25 CFR 131.5(b) 3/ and 131.8 (1965).

Paragraph two, as we read it, applies only in the event arbitration is invoked. It in no manner restricts the superintendent's determination as to the amount of the adjustment under paragraph one. To give paragraph two appellant's interpretation would be an infringement on the Secretary's duty and responsibility to adjust the rental based on the guidelines set forth in paragraph one of the lease and applicable regulations. Accordingly, we find that the 20 percent limitation contained in paragraph two, ARBITRATION, is not applicable to paragraph one, RENTAL ADJUSTMENT CLAUSE.

2/ Pertinent part of 25 CFR 131.8 in effect at the time (1965) provides:

"Except for those leases authorized by § 131.5(b)(1) and (2), unless the consideration for the lease is based primarily on percentages of income produced by the land, the lease shall provide for periodic review, at not less than five-year intervals, of the equities involved. Such review shall give consideration to the economic conditions of the time, exclusive of improvement or development required by the contract or the contribution value of such improvements."

3/ 25 CFR 131.5(b) provides:

"Except as otherwise provided in this part no lease shall be approved or granted at less than the present fair annual rental."

Having found that the 20 percent limitation is not applicable to paragraph one, there remains only the question as to whether the superintendent's adjustment of the rental from \$2,100 to \$5,500 per annum (\$62.50 per acre) beginning December 1975 was justified.

In arriving at the increase in rental beginning December 1975, the superintendent utilized the rental appraisal prepared by Richard C. Swanson, Area Chief Appraiser, on November 4, 1975. To determine fair market rental value, Swanson used as comparables four 25-year orchard leases on Indian lands situated within 1 to 1-1/2 miles of the property involved. In addition to the four leases Swanson used a 25-year orchard lease some 16 miles southwest of the subject property on which the rental had been adjusted in 1973 from \$44.50 per acre to \$57.50 per acre to show the increase in rental values generally since 1973.

In support of his contention that a 20 percent increase in rental beginning December 1975 is all that could be justified under any circumstances, the appellant offers the fair market value appraisal prepared by Marion L. Pierce, a realtor-appraiser. As basis for his opinion that the fair market rental on the subject property was about \$36 per acre, Pierce used six 5-year leases as comparables. The six leases involved raw and unimproved land. None of the comparables involved leases on Indian trust lands even though such leases were available for use as comparables.

It is undisputed that the highest and best use for the tract involved herein is for horticultural purposes.

In comparing and reviewing the appraisals we disagree with Judge Clarke's removal from consideration of comparables Nos. 50 and 54, two of the comparables used by Swanson in arriving at the fair rental value. It appears that the foregoing comparables were dismissed merely because they were of greater value than the other comparables. We do not agree that only tracts of identical or lesser value should be used as comparables in an appraisal. Moreover, Swanson's comparables involved 25-year orchard leases which we consider as proper in arriving at the fair rental value in this case.

Pierce on the other hand, in his appraisal, used six 5-year leases on raw and unimproved land as comparables. We do not consider the leases used by Pierce as fair comparables in concluding that the subject tract would command only a fair rental value of about \$36 per acre in 1977 and \$32 per acre in 1975.

In view of the reasons set forth above, we must conclude that the fair annual rental of \$5,500 as determined by appraiser Swanson and upon which the superintendent based his rental adjustment is justified and Judge Clarke's recommendation to the contrary is rejected. We find

that to accept less than the foregoing amount would not be in keeping with the rental adjustment clause of the lease and the regulations.

NOW THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of May 18, 1977, of the Commissioner, Bureau of Indian Affairs, affirming the decision of September 24, 1976, of the superintendent, Yakima Agency, adjusting the annual rental on lease No. 3644 to \$5,500 effective as of December 1, 1975, is affirmed.

This decision is final for the Department.

Done at Arlington, Virginia.

//original signed

Alexander H. Wilson
Chief Administrative Judge

We concur:

//original signed

Wm. Philip Horton
Administrative Judge

//original signed

Mitchell J. Sabagh
Administrative Judge